IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al*.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR STAY OF THE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

None of the arguments advanced by appellees undermines Microsoft's position that this Court should stay issuance of its mandate pending the Supreme Court's final disposition of Microsoft's petition for a writ of certiorari.

Microsoft's stay motion complies fully with Rule 41 of the Federal Rules of Appellate Procedure, which requires a showing "that the certiorari petition would present a substantial question and that there is good cause for a stay." (Circuit Rule 41 is to the same effect.) Appellees' effort to import a strict "irreparable injury" requirement into Rule 41 should be rejected. The cases on which appellees rely all involve a single Justice of the Supreme Court considering an application to stay a final judgment under 28 U.S.C. § 2101(f) after a court of

appeals has already denied such a stay. Those cases, which do not purport to interpret Rule 41, are inapposite.

As this Court noted in *Lincoln Tel. & Tel. Co.* v. *FCC*, 659 F.2d 1092, 1110 (D.C. Cir. 1981) (per curiam), a case cited by appellees (Appellees' Br. at 2 n.1), a stay pending a petition for a writ certiorari may be granted if the stay is "necessary to serve the public interest and will not substantially harm the opposing parties in th[e] proceeding." *See* ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 16.8, at 467-68 (2d ed. 1989). That standard is met here.

The public interest will be served by granting a stay. The district judge, while disqualified by virtue of deliberate and repeated violations of clear ethical rules, entered findings of fact and conclusions of law that have been and will be relied upon in subsequent proceedings in this case and perhaps in other cases. As this Court observed, the extraordinary pattern of misconduct engaged in by the district judge—which began two months before entry of the findings of fact and six months before entry of the conclusions of law—created an appearance of partiality in violation of 28 U.S.C. § 455(a). (Op. at 120.) The public interest would not be served by permitting proceedings on remand to commence before the Supreme Court has had an opportunity to decide whether actions tainted by the district judge's misconduct must be vacated.

On the other side of the balance, appellees make no showing that they will suffer substantial harm if this Court grants the requested stay. If the Supreme Court elects not to consider the question posed in Microsoft's petition, the stay will likely remain in effect for no more than six weeks. Little will happen during that short period. In any case, appellees offer only vague generalizations about purported uncertainty in the computer industry that they say will

persist until the case is finally resolved, without specifying any imminent harm to consumers. (Appellees' Br. at 7.) Yet, as appellees concede, this supposed uncertainty has done nothing to stop "Microsoft and other market participants" from continuing "to develop and introduce new products." (*Id*.)

Although Appellees are correct that the Supreme Court does not routinely grant certiorari in cases where final judgment has not been entered, they ignore the established exception to that rule. (*See* Appellees' Br. at 2-3.) Where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.18, at 196 (7th ed. 1993).

Whether a showing of actual bias is necessary to disqualify a judge as of the date of his earliest known violation of 28 U.S.C. § 455(a) is an important issue of law that is fundamental to the further conduct of this litigation. If the district court's findings of fact and conclusions of law—entered while he was legally disqualified under 28 U.S.C. § 455(a)—are vacated, that would render invalid any actions taken on remand in reliance on those findings and conclusions. Judicial efficiency alone counsels in favor of waiting the short time it will take the Supreme Court to decide whether to grant Microsoft's petition. With regard to appellees' purported concern about "piecemeal appeals" (*see* Appellees' Br. at 3), this is not a case in which a party is seeking "to halt … the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it." *Segurola* v. *United States*, 275 U.S. 106, 112 (1927) (quoted in *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940)). The question raised by Microsoft's petition is not peripheral; it goes to the very heart of the case.

Appellants are wrong in arguing that the proper remedy for the district court's violations of 28 U.S.C. § 455(a) is vested solely in this Court's discretion. (*See* Appellees' Br. at 4-5.) What the Supreme Court stated in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988), was that it would afford "due consideration" to the judgment of a court of appeals as to the proper remedy for a violation of 28 U.S.C. § 455(a) because in most cases the court of appeals "is in a better position to evaluate the significance of the violation." This Court held that the district judge's violations of 28 U.S.C. § 455(a) were highly significant. In fact, the Court noted that "[t]he rampant disregard for the judiciary's ethical obligations that the public witnessed in this case undoubtedly jeopardizes 'public confidence in the integrity' of the District Court proceedings." (Op. at 117 (quoting Canon 2A of the Code of Conduct of United States Judges).)

Given the severity of the misconduct at issue, and its acknowledged adverse impact on the public's perception of the judiciary, Microsoft has asked the Supreme Court to consider whether this Court erred by requiring a showing of actual bias before setting aside findings of fact and conclusions of law entered while the district judge was disqualified under 28 U.S.C. § 455(a). Actual bias is not one of the three factors enumerated by the Supreme Court in *Liljeberg* that appellees say the Court should weigh in fashioning a remedy for violations of 28 U.S.C. § 455(a). (*See* Appellees' Br. at 4.) To the extent other courts of appeals have said that actual bias is relevant to the scope of disqualification, those decisions also conflict with *United States* v. *Cooley*, 1 F.3d 985 (10th Cir. 1993), and *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991). Making actual bias the "[m]ost important" factor in determining the proper remedy for a violation of 28 U.S.C. § 455(a) (Op. at 122) is particularly unjustified when the actions giving rise to the disqualification were neither inadvertent nor obscure but

rather were deliberate and blatantly improper. Finally, appellate review of the record—no matter how painstaking—cannot remedy the public perception of injustice when the *ex parte* communications at issue occurred not in the courtroom but behind closed doors, off the record, and were actively concealed by the district judge. (*See* Appellees' Br. at 4.) Thus, giving "due consideration" to this Court's views—including its acknowledgement that "there is fair room for argument that the District Court's factfindings should be vacated *in toto*" (Op. at 124)—the Supreme Court could well conclude that this Court erred as a matter of law in not disqualifying the district judge as of the date of his earliest known violation of 28 U.S.C. § 455(a).

Appellees' effort to distinguish *Preston* and *Cooley* is unpersuasive. (*See* Appellees' Br. at 5-6.) Neither case turned on the fact that the conduct giving rise to the disqualification occurred before the relevant proceeding began. Even if timing were the critical factor, the decisions in *Preston* and *Cooley* do not support appellees' contention that it is permissible to uphold actions taken by a district judge when he is disqualified by statute from adjudicating a case. Instead, by parity of reasoning, the district judge here was disqualified as soon as the conduct giving rise to the violations of 28 U.S.C. § 455(a) began.

Appellees take Microsoft to task for not addressing *In re School Asbestos Litig*., 977 F.2d 764 (3d Cir. 1992), and *In re Allied Signal Inc.*, 891 F.2d 974 (1st Cir. 1989), in its stay motion. (Appellees' Br. at 6.) They neglect to mention, however, that Microsoft distinguished both decisions in its petition for a writ of certiorari. (*See* Petition at 23 n.7 & 24 n.8.)

In the Third Circuit case, the disqualified judge's summary judgment decisions were subject to *de novo* review on appeal, and his decisions regarding trial procedure were open to reconsideration by the new district judge, so the court saw no need to vacate those decisions.

In re Sch. Asbestos Litig., 977 F.2d at 787. Here, the district court's findings of fact were not subject to *de novo* review on appeal. To the contrary, to Microsoft's substantial prejudice, those findings received substantial deference under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.

In the First Circuit case, the court noted that the parties seeking disqualification "have not pointed to any specific findings or rulings already made in the … litigation that are incurable or could have preclusive effect in some other action." *In re Allied Signal, Inc.*, 891 F.2d at 973. As Microsoft has observed, nothing in the district court's findings of fact is "curable" at this stage of the case, and the plaintiffs in the more than 150 private class actions pending against Microsoft around the country are sure to argue that certain of those findings should have preclusive effect.

Appellees' reliance on *United States* v. *Cerceda*, 172 F.3d 806 (11th Cir. 1999) (en banc) (per curiam), is utterly misplaced. In *Cerceda*, the Eleventh Circuit examined the three factors set forth in *Liljeberg* to determine the appropriate remedy for a violation of 28 U.S.C. § 455 (a). The court's discussion of those three factors supports Microsoft's position.

As to the first factor, *i.e.*, the risk of injustice to the parties in the case, the court stated that the relevant considerations were (i) the existence of circumstances that might indicate a risk of injustice to the party seeking disqualification, and (ii) the seriousness of the violation of 28 U.S.C. § 455(a) involved. *Cerceda*, 172 F.3d at 813. The court also noted that the party opposing vacatur bears the burden of showing that a new trial would impose "special hardship" on it. *Id*. at 814. At a minimum, the fact that the district judge in this case expressed to a reporter "his distaste for the defense of technical integration—one of the central issues in the lawsuit" (Op. at 109)—two months before he issued his findings of fact is a circumstance that

does—not just *might*—indicate a risk of injustice to Microsoft. Moreover, it is agreed by all parties that the district judge's many violations of 28 U.S.C. § 455(a) were extremely serious. Finally, while appellees would be required to devote resources to a retrial of the case, there are going to be substantial proceedings on remand in any event, and there is no basis for asserting that the delay between the original trial and a new trial would seriously compromise appellees' ability to prove their claims. All of the witnesses who testified in the original trial are alive and well. *Cf. Cerceda*, 172 F.3d at 815 (key government witness 84 years old and in poor health at time of original trial, six years earlier).

As to the second *Liljeberg* factor, *i.e.*, the risk that the denial of relief will produce injustice in other cases, the Eleventh Circuit noted that its judicial council had recently adopted a protocol that would make it very unlikely that conduct at issue would recur. *Cerceda*, 172 F.3d at 815. No parallel change in ethical rules has occurred in this case, and the violations committed by the district judge are so extreme that they demand strong remedial action to deter other judges from engaging in similar misconduct. That is particularly true given that this Court previously admonished the district judge for engaging in similar misconduct. *See In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991); *see also* Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and Sanctions—A Case Study of the Microsoft Litigation*, 2001 UNIV. ILL. L. REV. 611, 627 ("The remedy of reversal should be more likely in the situation where an appellate court has already warned the judge not to engage in such extrajudicial comments.").

As to the third *Liljeberg* factor, *i.e.*, the risk of undermining public confidence in the judicial process, the Eleventh Circuit stressed that the ethical violation at issue was "neither egregious nor clear cut." *Cerceda*, 172 F.3d at 815-16. As a result, the court held that

vacating the convictions of large numbers of defendants convicted of serious crimes based solely on a technical violation of 28 U.S.C. § 455(a) would actually undermine public confidence in the judicial process because the proceedings leading to those convictions "seemed completely fair." *Id.* at 816. Here, the Court has found that the district judge's ethical violations were "deliberate, repeated, egregious and flagrant." (Op. at 106.) In addition, the district judge's conduct was anything but fair. As this Court stated, "[t]he public cannot be expected to maintain confidence in the integrity and impartiality of the judiciary in the face of such conduct." (Op. at 117.)

In short, *Cerceda* buttresses Microsoft's position that this Court should have disqualified the district judge as of the date of his earliest known violation of 28 U.S.C. § 455(a), not some eight months later, after he had decided critical issues in the case. By not giving effect to the disqualification until eight months after the district judge's first known violation of 28 U.S.C. § 455(a)—primarily because of the absence of proof of actual bias—this Court's decision conflicts with *Liljeberg* itself, as well as with *Preston* and *Cooley*. That conflict raises a substantial question worthy of the Supreme Court's consideration, and this Court should stay issuance of its mandate until the Supreme Court decides whether to grant Microsoft's pending petition.

For the foregoing reasons, as well as for the reasons stated in Microsoft's motion, Microsoft respectfully requests the Court to stay issuance of its mandate pending final disposition of Microsoft's petition for a writ of certiorari in the Supreme Court.

Respectfully submitted,

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August 14, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2001, I caused two true and correct copies of the foregoing Appellant's Reply Brief in Support of Motion for Stay of the Mandate Pending Petition for Writ of Certiorari to be served by hand upon:

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